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No. 05-347

IN THE

Supreme Court of the United States

CHARLENE JENKINS,
Petitioner,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, INC. AND FIRST NATIONAL BANK IN BROOKINGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioner, Charlene Jenkins, is an individual and resident of the State of Georgia. As only the question of arbitrability was decided at the trial court level, Petitioner has no established knowledge as to Respondents' corporate inter-relationships. Based upon the disclosures made in the trial court, Petitioner can provide the following disclosures:

First American Cash Advance of GA

Sole Member and Chief Manager: First American Holding, LLC

Affiliates:
- First American Cash Advance of OK, LLC
- First American Cash Advance of AR, LLC
- First American Cash Advance of CO, LLC
- First American Cash Advance of FL, LLC
- First American Cash Advance of KY, LLC
- First American Cash Advance of SC, LLC
- First American Investments of GA, LLC
- First American Cash Advance of TN, LLC f/k/a Kugler, LLC
- United Services, Inc.
- Foresight Management Co, LLC
- Union Management Co., LLC
- FACA of KY, LLC
- FACA of AR, LLC
- First American Franchising, LLC
- First American Financial Services, LLC

First National Bank in Brookings

owned by: Fishback Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner suggests respectfully that the sanctity of arbitration is not at issue in this case. Rather, the question is whether section 2 of the FAA immunizes and shelters the payday lending industry's $40 Billion in annual cash advancement practices[1] by prohibiting the judiciary from applying state law principles of contract construction in order to make substantive gateway determinations about the question

[1] *See* Brief of Amicus Curiae Community Financial Services Association of America in Support of Petitioner, p. 2, filed before this Court in *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264.

of arbitrability solely because the underlying agreement also houses an arbitration clause.

But regardless of Petitioner's view that the arbitration clauses are being improperly used to accomplish the sinister and single-purpose of perpetuating criminal activity, this Court is called upon to resolve and harmonize the emerging conflict between state law decisions that apply state law contract principles to invalidate payday lending contracts (and the arbitration clauses they contain) and federal decisions, like the Eleventh Circuit in the underlying case, that refuse to allow state law principles of contract construction to be considered when deciding gateway legal issues about the enforceability of an arbitration clause. At the outset, it should not go unnoticed that this peculiar conflict arises almost entirely in the context of litigation involving the efforts of payday lenders—many of which prey upon our military personnel, the elderly and disadvantaged consumers—to infuse arbitration clauses into uniform loan agreements that are repeatedly and regularly declared by state legislative bodies and other state law enforcement agencies to be usurious loan transactions which, as a matter of state law, are illegal, unenforceable and treated as though they never existed at all.

In refusing to allow federal trial courts to consider and apply state law contract principles that would clearly invalidate the underlying payday lending contracts, the Eleventh Circuit has, first in *Bess v. Check Express, Inc.* and again in *Jenkins v. First American Cash Advance of Georgia, Inc.*, rendered meaningless the express declarations of Congress in 9 U.S.C. § 2 that arbitration clauses are valid, "***[except] upon such grounds as exist at law or in equity for the revocation of any contract.***" By preventing federal trial courts from making substantive gateway determinations, the Eleventh Circuit is promoting the contrary and wrong view that arbitra-

tion clauses can be elevated above the payday loan agreements in which they are housed.

This Court has recently granted Certiorari to review the Florida Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (*cert. granted* June 20, 2005). As *Cardegna* represents the prevailing state law view on what section 2 of the FAA and this Court's interpretation of it means, the Eleventh Circuit's panel decision of *Jenkins v. First American Cash Advance of Georgia, Inc.*, represents a conflicting federal view and demonstrates how dramatically different the result can be when a trial court is prohibited from considering state law contract principles to decide if the arbitration clause is enforceable. As Justice Breyer noted in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration."

Petitioner respectfully suggests Certiorari is therefore appropriate on the basis of bringing the full conflict before the Court and also because the outcome in *Cardegna* will necessarily impact the conflicting federal view and the precedent set forth in *Jenkins*—the time in which to appeal is now in hand. However, should the Court determine that *Jenkins* adds nothing new to the debate already before it, the Court should grant the requested Petition for a Writ of Certiorari and hold the case until the propriety of *Cardegna* is determined and the conflict resolved.

OPINIONS BELOW

The District Court below rightly denied arbitration of Charlene Jenkins' dispute with her payday lender. Applying state rules of contract construction as required and permitted by section 2 of the FAA, the court held that the making of the arbitration agreement was at issue and under Georgia law both the loan agreement and the arbitration clause it housed

were unconscionable as a matter of state law and could not be enforced. *Jenkins v. First American Cash Advance of Georgia, LLC*, 313 F. Supp. 1370 (S.D. Ga. 2003) ("*Jenkins I*"). On appeal the reviewing panel of the Eleventh Circuit reversed, concluding the trial court had no right to determine the validity of the agreement to arbitrate since Jenkins' challenge to both the loan agreement and the arbitration clause housed therein were questions for the arbitrator—not the court—to decide. *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. Feb. 18, 2005)("*Jenkins II*"), *reh'g denied* April 29, 2005. By order dated May 18, 2005, issuance of the mandate in *Jenkins* was stayed pending acceptance of Certiorari and final resolution by this Court.

JURISDICTION

The panel decision rendered by the United States Circuit Court of Appeals for the Eleventh Circuit conflicts with precedent from this Court, other decisions in the Eleventh Circuit and decisions by state courts of last resort. Jurisdiction is therefore appropriate pursuant to Rule 10(a) of the Court's Rules.

The decision sought to be reviewed here was rendered on February 18, 2005, and a petition for Rehearing En Banc was denied on April 29, 2005. By Justice Kennedy, the time to file this petition was extended until September 12, 2005. The petition is therefore timely submitted.

PERTINENT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Acts provides in pertinent part:

> . . . an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, ***save upon such grounds as exist at law or in equity for the revocation of any contract***.

(Emphasis added.) Section 4 of the Federal Arbitration Act provides in pertinent part:

> . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Between the four-month span of June 2002 and September 2002, Charlene Jenkins entered into at least eight payday lending transactions with First American Cash Advance of Georgia, LLC ("First American") and First National Bank in Brookings ("FNB")[2]. Each of the loans was for less than $500 and had a maturity date between 7 and 14 days. The annual percentage rates charged for these loans ranged from a low of 438% to a high of 938%. Most of the loans in question charged an interest rate of about 469%. Each time Jenkins entered into a payday lending transaction, as a condition to receiving the money, she was required to sign a promissory note that included an arbitration agreement.

In the trial court, Jenkins asserted the payday loan agreements were illegal and that both the promissory note for the loan and the arbitration clause it contained were unconscionable and could not be enforced. Among the many factors permitted by state law, the District Court concluded that "[t]he type of consumer loans that Defendants offer unquestionably places the consumer at a severe bargaining disad-

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[2] Jenkins claimed that only First American, and not FNB, was the true lender.

vantage." *Jenkins I*, 1370 F.Supp.2d at 1374. The same state law factors the district court considered in finding the loan agreement unconscionable and unenforceable also apply to the arbitration clause. Charlene Jenkins' relative bargaining position, acumen and intelligence did not change simply because she turned the page and placed her signature on a second page, purportedly agreeing to arbitrate. Notably, there is no severability clause contained in either the promissory note or the arbitration clause, and there was no separate consideration paid for the agreement to arbitrate.

STATEMENT OF THE ISSUES ASSERTED TO MERIT THE GRANT OF CERTIORARI

The basic practices engaged by the payday lending industry are already before this Court on a writ of certiorari to review the holding of *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (*cert. granted* June 20, 2005), which represents the prevailing state law view that section 2 of the FAA permits and requires trial courts to apply state law contract principles when determining whether there is a valid agreement to arbitrate. As the briefing in *Cardegna* reflects, many other courts, including the District Court here involved, subscribe to this view and correctly hold that arbitration clauses are not "a class of 'super' clauses, immune from a state's otherwise generally applicable contract law." *Cardegna*, 894 So.2d 860, 866 (Bell, J., specially concurring). The panel decision in the underlying case, however, represents the Eleventh Circuit's opposite and conflicting view that an arbitration clause is not susceptible to challenge despite that the underlying loan agreement is illegal and unenforceable as a matter of state law contract principles. The *Cardegna* view is more accurate because it better reflects Congressional intent of section 2 of the FAA by placing the arbitration clauses on the same footing as the illegal loan agreements in which they are contained and therefore does not confer "super status" upon arbitration agreements.

By misapprehending or misapplying the FAA, *Prima Paint*, *Casarotto* and the predecessors and progeny of *Howsam*, and by failing to apply Georgia rules of contract construction, the reviewing panel in *Jenkins II* (based on the erroneous decision in *Bess v. Check Express, Inc.*) wrongly sheds the judiciary's critical role of deciding substantive gateway issues in matters respecting single-purpose contracts entered into solely for the purpose of perpetuating the very activity that the state law of Georgia has long ago and consistently banned. Consequently, by failing to allow its federal courts to consider basic rules of contract construction principles that may invalidate the entire agreement, including the arbitration clause, the Eleventh Circuit wrongly elevates the arbitration clause to something far more than the illegal and unconscionable contracts in which they are housed can ever be. Such a rationale is contrary not only to the mandates of the FAA but also to the repeated pronouncements in *Casarotto* and *Prima Paint* that arbitration clauses are afforded "the same footing as other contracts," "but not more so." *See Casarotto*, 517 U.S. 681, 687; *Prima Paint*, 388 U.S. 395, 404.

Finally, this Petition raises issues of exceptional importance because, as it stands, the panel decision disregards the very strong pronouncement of public policy to protect Georgia citizens, like Charlene Jenkins, and thereby improperly enables payday lenders to perpetuate the very activity that no Georgia court can lend its aid. Accordingly, the state's authority and efforts to regulate matters of consumer protection is severely hampered if predatory payday lenders are allowed to circumvent the law simply by inserting arbitration clauses into an agreement that is wholly illegal and unenforceable.

I. BACKGROUND TO GEORGIA'S STRONG PUBLIC POLICY AGAINST PAYDAY LENDING ACTIVITIES.

The law in Georgia has always said that there are certain contracts—like those tending to corrupt legislation or the judiciary and wagering contracts—that are contrary to the public policy of Georgia and cannot be enforced. *E.g., Department of Transp. v. Brooks*, 328 S.E.2d 705, 711-12 (Ga. 1985). Efforts to eradicate payday lending within Georgia's borders are not a new judicial or legislative undertaking. Indeed, both our courts and the General Assembly have long ago pronounced that payday lending is an illegal practice that must be stopped. In this regard, the Georgia Supreme Court has held:

> No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not according to the kind of paper-bag it is put in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance.

Pope v. Marshal, 78 Ga. 635, 640 (1887). Despite very strong judicial and legislative pronouncements against payday lending practices, payday lenders continue to thrive in Georgia.

"Payday lending" is a new name for an old practice, formerly known as "wage buying." *USA Payday Cash Advance Centers v. Oxendine*, 585 S.E.2d 924, 926 (Ga. App. 2003), *cert. denied.* The vernacular descriptions of payday lenders as "loan sharks," "street shylocks," and "wage-buyers," have also been recognized by Georgia courts and properly characterize the predatory nature of these transactions. *Freeman v. Decatur Loan & Finance Corp.*, 231 S.E.2d 409 (Ga. App. 1976). In light of the danger they pose, the payday lending trade has been the subject of repeated regulation since the

early Twentieth Century. To this end, the Georgia General Assembly, together with the other state agencies charged with policing illegal practices, have made extraordinary efforts to criminalize, cease and prosecute payday lenders that violate the law.

In 2004, the General Assembly enacted SB 157 (2004 Ga. Laws 440), which is a recodification of existing law. *See* O.C.G.A. § 16-17-1 *et. seq*. Although many of the substantive enhancements to existing law will not be applied retroactively in this case, the legislation is important and relevant to this Court's analysis because it recognizes and emphasizes Georgia's long-standing prohibition of predatory lending activities in Georgia.

With regard to payday lenders especially, the General Assembly has declared:

> (b) Despite the fact that the Attorney General of the State of Georgia has opined in Official Opinion 2002-3 entered on June 27, 2002, that payday lending is in violation of Georgia law and despite the fact that the Industrial Loan Commissioner has issued cease and desist orders against various payday lenders in the State of Georgia, the General Assembly has determined that payday lending continues in the State of Georgia and that there are no sufficient deterrents in the State of Georgia to cause this illegal activity to cease.
>
> (c) . . . . The General Assembly has further determined that payday lending, despite the illegality of such activity, continues to grow in the State of Georgia and is having an adverse effect upon military personnel, the elderly, the economically disadvantaged, and other citizens of the State of Georgia. . . . [and] declares that these types of loans are currently illegal and are in violation of Code Section 7-4-2.

> (d) Payday lending involves relatively small loans and does not encompass loans that involve interstate commerce and certain payday lenders have attempted to use forum selection clauses contained in payday loan documents in order to avoid the courts of the State of Georgia, and the General Assembly has determined that such practices are unconscionable and should be prohibited.

O.C.G.A. § 16-17-1(b)(c)&(d). To be sure that the Georgia General Assembly disapproves of payday lending, in whatever form, O.C.G.A. § 16-17-8 provides:

> The site or location of a place of business where payday lending takes place in the State of Georgia is declared a public nuisance.

Thus, despite that additional legislation continues to be passed, the General Assembly's enactment of SB 157 makes it ***crystal clear*** that payday lending has in the past violated, and in the present continues to violate, the public policy and laws of Georgia and must be stopped.

II. *JENKINS II* CONFLICTS WITH AND MISAPPLIES CONTROLLING PRECEDENT.

Where state law operates to nullify an agreement based on generally applicable contract law, the making of the underlying agreement (and necessarily all of its other parts) is a substantive issue for the courts to decide. The Court has articulated this fundamental principle several times:

> [A] gateway dispute about whether the parties are bound by a given arbitration clause raises 'a question of arbitrability" for a court to decide. . . . a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for

> the court [and] . . . . in the absence of an agreement to the contrary, issues of substantive arbitrability are for the court.

Howsam v. Dan Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002) (other citations omitted).

It is beyond any serious dispute that the single purpose of Jenkins' underlying contract (and the arbitration clause housed therein) is to perpetuate the very activity that the Georgia General Assembly long ago banned. Thus, contrary to the Eleventh Circuit's rationale, the question of arbitrability is a substantive issue and cannot be referred to an arbitrator simply because Charlene Jenkins' signature appears on a loan document that also contains an arbitration clause. The "question of arbitrability" cannot, simply in deference to the federal preference for arbitration, be passed upon by the trial court.

A. The Panel Misapplied *Prima Paint.*

The panel decision's application of *Prima Paint's* holding that "the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally" to Jenkins' claims here that both the loan agreement and the arbitration clause it houses are unenforceable is misapprehended. In *Prima Paint*, the application of fraud in the inducement did not render the underlying contract **void** as contrary to public policy. Instead, a plaintiff's allegation of fraud in the inducement renders a contract **voidable** at the election of the defrauded party. *See e.g., Gress v. Knight*, 68 S.E. 834, 835 (Ga. 1910)("Fraud does not render a contract absolutely void, but voidable."); *Cancannon v. Smith Barney*, 805 F.2d 998, 1000 (11th Cir. 1986) (distinguishing the consequences of fraud in the inducement from fraud in the *factum*). A ***voidable*** contract is not the same thing as one that is ***void*** from its inception. If an agreement is void from its inception, assent to the other terms it contains (i.e. agreements regarding

choice of law, liquidated damages, arbitration and whatnot) must also be determined. Adhering to the mandates of section 4, a court—not an arbitrator—must determine whether the making of the arbitration agreement is at issue and if so must then decide all substantive gateway issues. In this regard, *Prima Paint* does not lend support to the *Jenkins* panel's contrary conclusion.

In *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992)—not a payday lending case—the Eleventh Circuit recognized "*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*." *Id.* (emphasis supplied). As discussed *infra*, when Georgia law is applied to the contracts at issue, they are rendered "*illegal* and absolutely void" and, hence, are treated by our courts as though they *never existed at all*. *See Hanley v. Savannah Bank*, 68 S.E.2d 581, 582 (Ga. 1952). Therefore, if none of the other terms of the underlying contract can exist, neither can the arbitration clause contained among them. Importantly, *Prima Paint* does not deal with situations where, like here, strong public policy pronouncements by our courts and the Georgia General Assembly, coupled with statutory rules of contract construction, actually operate to influence the validity of the contracts that house the payday lending industry's arbitration clauses at issue here.[3]

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[3] In *Bess v. Check Express, Inc.* the Eleventh Circuit first announced it was deciding the issues only under federal law, not state law principles: "In reaching our decision, however, *we are not deciding questions of Alabama contract law;* rather, we are deciding the scope of the district court's authority under 9 U.S.C. § 4, a question of federal law." 294 F.2d at 1306 n.3 (emphasis supplied). Below, and here, Jenkins respectfully submits that the failure to consider state contract law is contrary to the requirements of § 2 of the FAA.

B. The Panel Failed To Correctly Apply the FAA and *Doctor's Associates, Inc. v. Casarotto.*

Principles of comity and federalism demand respect for a state's strong public policy and the state rules of contract construction. To this end, the FAA does not authorize arbitration where the arbitration clause is unenforceable because of generally applicable state law. Indeed, the FAA places arbitration agreements on an equal footing with all other contracts and, although the FAA embodies a strong policy in favor of arbitration, this Court has placed limits on how far a district court can reach to compel arbitration: "By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed '***upon the same footing as other contracts***.'" *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)(emphasis added). *See also Prima Paint*, 388 U.S. 395, 404 ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, ***but not more so***.")(emphasis added).

This, the reviewing panel failed to do. To the contrary, by consistently refusing to allow trial courts to consider state law contract principles, the panel decisions of *Jenkins* and the equally erroneous decision of *Bess v. Check Express, Inc.* wrongly elevate the arbitration clause to something far more than the voided contract in which it is housed can ever be. Stated differently, the decisions effectively refer to arbitration a matter that can never even be entertained by a Georgia court. Such a determination, however, is a gateway issue which, in the context of matters that are adverse to the declared public policy of Georgia, should be decided in an open forum, subject to the view of the public and media, and reported as precedent for others to follow. Under the Eleventh Circuit's approach, so long as payday lenders use arbitration clauses in their contracts neither federal nor state courts will have the opportunity to enforce the laws prohibiting usurious contracts.

C. The Arbitration Clause is "At Issue."

By referring the matter to an arbitrator, the reviewing panel failed to consider and apply precedent that squarely places ***the making of the underlying arbitration agreement in issue***. Again relying on *Prima Paint*, the Eleventh Circuit recognized in *Chastain v. Robinson-Humphrey Company, Inc.*, that assent is an essential element to the arbitration agreement and held:

> Where the allegation is one of ***ineffective assent*** to the [underlying] contract, the issue of arbitrability is not subject to resolution pursuant to an arbitration clause contained in the contract documents.

957 F.2d at 854 (quoting *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000 (11th Cir. 1986)). Based upon that recognition, the court in *Chastain* held that "**if the validity of the agreement to arbitrate is in issue, a district court, not a panel of arbitrators, must decide if the arbitration clause is enforceable against the parties**." 957 F.2d at 853-54 (citing *Prima Paint*, 388 U.S. at 403-04)(emphasis added). This holding was completely ignored by the panel decisions of *Jenkins II* and *Bess*. When the validity of the underlying agreement is not possible, the making of the arbitration clause housed therein is in issue and a court must decide the gateway question: *Is the arbitration clause enforceable*? The trial court, applying state law principles of contract construction, held it was not.

In *Cancannon*, the Eleventh Circuit has in fact accepted that a Plaintiff cannot be compelled to arbitrate where the underlying contract containing an arbitration clause is void from its inception due to fraud in the "factum," (i.e.—it was rendered void by operation of law): "***Under this theory, no contract existed between the parties, and the plaintiffs could not be subject to the arbitration clause contained in the documents***." 805 F.2d 998, 999 (emphasis added). The

scenario is absolutely no different in this case. If the law operates to invalidate the underlying contract, neither Jenkins nor her payday lender can assent to the terms of the underlying contract including arbitration. The invalidity of the underlying contract certainly places the making of the arbitration agreement "at issue" for the court to decide whether the arbitration clause is otherwise enforceable based on state law principles of contract construction.

D. The Panel Failed To Apply Georgia Law.

Georgia law could not be clearer that payday lending activities are criminal, illegal acts that are contrary to public policy. The passage of SB 157 in 2004 did not suddenly make payday lending activity illegal. In this regard, Georgia's rule of contract construction prevents the parties from assenting to all the terms contained within the payday lending contracts because they are nothing more than an agreement to perform a contract with a single, yet illegal, purpose—payday lending.

> The general rule of law in regard to contracts contrary to public policy is [stated] as follows: If an agreement binds the parties or either of them to do, or if the consideration is to do, something opposed to the public policy of the state or nation it is *illegal* and absolutely void, however solemnly made.

Hanley v. Savannah Bank, 68 S.E.2d 581, 582 (Ga. 1952) (emphasis supplied). This long-standing consequence remains true today. *E.g., H.G. Brown Family LTD v. City of Villa Rica*, 607 S.E.2d 883, 886 (Ga. 2005)(A contract beyond the local government's authority is *ultra vires* and null and void.); *R.R.R. Ltd. Partnership v. Recreational Services, Inc.*, 448 S.E.2d 211, 213 (Ga. 1994)("In this state, a contract to do an illegal thing is void.") (citations omitted).

> If the consideration [for a contract] is good in part and void in part, the promise will or will not be sustained,

> depending upon whether it is entire or severable.[4] If the consideration is illegal in whole or in part, the whole promise fails.

Barger v. Gardenway, Inc., 499 S.E.2d 737, 725 (Ga. App. 1998) (quoting O.C.G.A. § 13-3-45) *cert. denied*.

> A court of justice will not lend its aid to the enforcement of any contract the making of which is prohibited, nor to the enforcement of anything necessary to complete the accomplishment of an unlawful purpose.

Minor v. McDaniel, 435 S.E.2d 508, 510 (Ga. App. 1993).

Under the simple and clear principles of Georgia contract law, an illegal agreement (despite that it may also contain an arbitration clause) cannot flower into an otherwise enforceable contract. Since the underlying contract fails, so too must all of its terms, including the arbitration clause housed therein. The contrary rationale of the Eleventh Circuit is simply not what Congress could have meant by specifically directing that arbitration clauses are valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

III. ARBITRATORS CANNOT DECIDE SUBSTANTIVE GATEWAY LEGAL ISSUES

Respondents in opposition to this Petition will undoubtedly argue that because arbitrators are equally equipped to hear and decide the issues, courts must blindly apply the federal preference for arbitration and rid the trial courts of their obligation under the FAA. In fact, the payday lending industry and all of its Amici have already done so through their

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[4] Petitioner again notes that both the exemplar loan agreement and the exemplar arbitration clause on record lack severability clauses. Thus, whether the parties agreed that the arbitration clauses could be severed from the illegal contracts in which they are included is also a gateway issue for the court's consideration.

briefing in *Cardegna*. But whether arbitrators are equally equipped to decide the issues is not the question the Court must answer here. As stated in the opening line of this Petition, this case is not about the sanctity of arbitration. Rather, it is about whom the FAA says must decide gateway legal issues and how those gateway determinations can be made. Indeed, this is the only check the FAA has to ensure that the agreement to arbitrate is valid and otherwise appropriate.

In mandating that courts—and not an arbitrator—must decide whether the making of an agreement to arbitrate is "in issue," section 4 of the FAA requires far more of the judiciary than simply looking at the underlying agreement to verify that a signature appears and that an arbitration clause is present. That Charlene Jenkins placed her signature upon an illegal agreement does not, and under Georgia state law cannot, mean her assent to the terms it contains is effective. If the state law can operate to invalidate the underlying agreement it can also operate to invalidate the arbitration clause contained therein.

CONCLUSION

Despite the clearly pronounced criminality and illegality of their transactions, payday lenders in Georgia thrive! One way in which the Georgia General Assembly notes they are able to do so is by imposing arbitration clauses in an effort to perpetuate activity that Georgia public policy forbids and court's will not enforce. Where state law validly operates to nullify single purpose agreements to perpetuate criminal activity, the making of the underlying agreement (and all of the terms therein) is at issue, the enforceability of which must be decided by a court of law in accordance with state law contract principles that govern its enforceability. The District Court properly did this.

The Court should therefore accept Certiorari of the *Jenkins* panel decision and resolve the conflict arising between state

and federal law about whether it is the district court, or the arbitrator, that must decide if an agreement voided by operation of state law can nevertheless be enforced through arbitration.

Respectfully submitted,

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September 12, 2005

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed February 18, 2005]

No. 03–16329
D. C. Docket No. 03–00094 CV-1

CHARLENE JENKINS, And All Other Persons
Similarly Situated,
Plaintiff-Appellee,

versus

FIRST AMERICAN CASH ADVANCE OF GEORGIA, LLC,
FIRST NATIONAL BANK IN BROOKINGS,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

Before ANDERSON, DUBINA and BLACK, *Circuit Judges*.

BLACK, *Circuit Judge*:

Plaintiff-Appellee Charlene Jenkins entered into several lending transactions with Defendants-Appellants First American Cash Advance of Georgia, LLC (First American) and First National Bank in Brookings (FNB). Each time Jenkins obtained a loan, she signed an Arbitration Agreement, in which she agreed to either arbitrate or assert in a small claims tribunal, any claim she had against Defendants. The Arbitration Agreements also required Jenkins to waive her right to participate in a class action against Defendants. Nonetheless,

Jenkins filed a class action lawsuit against First American and FNB in state court, asserting the loan agreements violated Georgia usury laws. After removing the case to federal court, Defendants moved to stay the court proceedings and compel arbitration. The district court denied Defendants' motion, finding the Arbitration Agreements were unconscionable. Pursuant to 9 U.S.C. § 16(a) (2000), Defendants appealed the denial of their motion to this Court. We reverse and remand.

I. BACKGROUND

FNB is a national bank chartered under the National Bank Act, 12 U.S.C. § 21-216(d) (2000), with its principal offices in South Dakota. From September 2001 through January 2003, First American, which is located in Georgia, managed and serviced loans for FNB; however, FNB set the credit scoring criteria for the loans and funded the loans. Customers, like Jenkins, seeking to obtain a loan from FNB would fill out a loan application at First American's offices. First American would electronically transmit the application to FNB for review. FNB would analyze the loan application and make the final decision on whether or not to extend credit. If FNB approved the application, it would send a Consumer Loan Agreement, which included a Promissory Note and an Arbitration Agreement, to First American. To obtain the loan, the customer would have to sign and date both the Promissory Note and the Arbitration Agreement.

The type of lending transactions at issue in this case are commonly referred to as "payday loans." In general, payday loans are small-dollar, short-term loans with high interest rates. In such transactions, a borrower receives a modest cash advance that becomes due for repayment within a short period of time, usually about 14 days. As security for the loan, the borrower gives a check to the payday lender in the amount of the cash advance, plus the interest charged by the lender. The interest rates in payday lending transactions typically range from 20% to 30% for a two-week advance,

which computes to an annual percentage rate of about 520% to 780%. If the borrower has not repaid the lender by the due date, the lender can negotiate the check.[1] Alternatively, the borrower may be able to extend the loan's due date by paying a fee. This type of extension is referred to as a renewal or a rollover.

Between June 2002 and September 2002, Jenkins entered into at least eight payday lending transactions with First American and FNB. Each of these loans was for less than $500 and had a maturity date between 7 and 14 days. The annual percentage rates charged by Defendants for these loans ranged from a low of 438% to a high of 938.57%. Most of the loans in question charged an interest rate of about 469% annually.

Like other FNB customers, Jenkins signed and dated a Promissory Note and an Arbitration Agreement each time she took out a loan. FNB was explicitly listed as the lender in the loan documents, and First American was listed as the "loan marketer/servicer." Each Promissory Note included a choice-of-law provision, stating the note was "governed by and construed in accordance with the laws of South Dakota." The Arbitration Agreements stipulated that they were governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2000), because the underlying lending transactions involved interstate commerce. Each Arbitration Agreement further stated if a court found the FAA did not apply to a particular transaction, then the Arbitration Agreement would be governed by the arbitration law of South Dakota.

The Arbitration Agreements signed by Jenkins provided that "all disputes" between the parties would be resolved by binding arbitration. They further stated Jenkins waived her right to participate in a class action against Defendants. Under

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[1] Borrowers' repayment checks were made payable to FNB and were deposited in a bank account in FNB's name.

the Agreements, Jenkins had the right to choose the arbitrator from a list of national arbitration organizations, or Jenkins and Defendants could agree on a local arbitrator. The Agreements required Defendants to advance Jenkins' arbitration costs if she submitted a written request for them to do so. The Arbitration Agreements also permitted the arbitrator to award reasonable attorneys' fees and expenses to the prevailing party "[i]f allowed by statute or applicable law."

The Arbitration Agreements provided only one exception to resolving disputes in arbitration: "All parties . . . shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction." The Agreements did, however, require appeals from the small claims tribunal to be resolved by arbitration. Therefore, by signing the Arbitration Agreements, Jenkins agreed to resolve any claim she had against Defendants by either submitting the claim to arbitration or raising it in a small claims tribunal.

The main provisions of the Arbitration Agreements were conspicuously disclosed in bold-faced capital letters:

You acknowledge and agree that by entering into this Arbitration Provision:

> (a) YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;
>
> (b) YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and
>
> (c) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICI-

> PATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.[2]

In addition, each Promissory Note signed by Jenkins included a clause stating:

> Arbitration: You acknowledge that you have read, understand and agree to the terms contained in the Arbitration Agreement you are signing in connection with this Note. By entering into the Arbitration Agreement, you waive certain rights, including the right to go to court, to have the dispute heard by a jury (except as specifically provided in the Arbitration Agreement), and to participate as part of a class of claimants relating to any dispute with Lender, First American or their affiliates.

Jenkins nevertheless filed a class action lawsuit against First American and FNB in the Superior Court of Richmond County, Georgia. In her complaint, Jenkins alleged the payday loan agreements violate Georgia's usury statutes, Ga. Code Ann. §§ 7-4-2, 7-4-18 (2004), and the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. Code Ann. § 16-14-4 (2003).

First American and FNB removed the case to federal district court. In federal court, First American and FNB sought to enforce the Arbitration Agreements signed by Jenkins. Defendants moved pursuant to the FAA to stay the court proceedings and to compel arbitration. Under the FAA, a written arbitration provision in "a contract evidencing a transaction involving [interstate] commerce . . . shall be valid, irrev-

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[2] The class action waiver was also conspicuously disclosed at another point in the Arbitration Agreements, where it was further explained: "THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION."

ocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). The FAA explains when a party to such an agreement fails or refuses to arbitrate, the other party may petition a federal district court for an order to compel arbitration. *Id.* § 4.

The district court found the payday lending transactions involved interstate commerce, and, therefore, the FAA applied. The district court, however, denied Defendants' motion to compel arbitration, finding the Arbitration Agreements were unenforceable because they were unconscionable. Defendants filed a motion to reconsider and to stay the proceedings pending this appeal. The district court denied the motion for reconsideration and granted the motion to stay the proceedings. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Pursuant to 9 U.S.C. § 16(a) (2000), we have jurisdiction over this appeal. 9 U.S.C. § 16(a) (2000) (authorizing an immediate appeal of any "final decision with respect to an arbitration").[3] We review de novo the district court's denial of

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[3] In her brief, Jenkins questions whether removal was appropriate in this case and suggests federal jurisdiction does not exist. This argument, however, is without merit. In *Beneficial National Bank v. Anderson*, 539 U.S. 1, 123 S. Ct. 2058 (2003), the United States Supreme Court held actions for usury against a national bank can be removed to federal court because the National Bank Act, 12 U.S.C. §§ 85–86 (2000), preempts state usury laws in such situations. Id. at 11, 123 S. Ct. at 2064. The Court explained:

> In actions against national banks for usury, [§§ 85 and 86] supercede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.

Id., 123 S. Ct. at 2064. Jenkins attempts to evade the Supreme Court's holding in *Anderson* by contending her usury claims were brought pri-

a motion to compel arbitration. *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1257 (11th Cir. 2003).

III. DISCUSSION

The parties raise, *inter alia*, the following three issues on appeal: (1) whether the district court erred in applying the FAA to the loan agreements in this case; (2) whether the district court erred in finding the Arbitration Agreements are unconscionable; and (3) whether the Arbitration Agreements are unenforceable because the underlying payday loans are illegal and void *ab initio* under Georgia law. We address each of these issues in turn.

A. *Applicability of the FAA*

The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651 (1991). The FAA's provisions "manifest a 'liberal federal policy favoring arbitration agreements.'" *Id.* at 25, 111 S. Ct. at 1651 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)). The Supreme Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be

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marily against First American, not FNB. She argues FNB was only included in her complaint because she was seeking a declaratory judgment finding FNB to be a "sham" lender. Her complaint, however, expressly named both First American and FNB as Defendants and charged them both with usury. The complaint consistently used the plural form of "Defendants." She asserted that "Defendants violated" Georgia usury laws, and that she was "entitled to recover from Defendants all interest charges paid by [her]." Because Jenkins charged a national bank with violating Georgia usury laws, removal was proper.

complainants.'" *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90, 121 S. Ct. 513, 521 (2000) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 109 S. Ct. 1917, 1920 (1989)).

The FAA makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (2000). The FAA defines "commerce" as "commerce among the several States." *Id.* § 1. The Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 2040 (2003) (citation omitted). The Court has further explained the phrase "evidencing a transaction" means only that the transaction turns out, in fact, to have involved interstate commerce, "even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277-81, 115 S. Ct. 834, 841–43 (1995).

In this case, the district court found the FAA applied because the underlying payday lending transactions involved interstate commerce. On appeal, Jenkins challenges this part of the district court's decision, contending there has been no showing that the loan agreements involved interstate commerce. Jenkins' contention is without merit.

The FAA's broad interstate commerce requirement is satisfied in this case. The lending transactions were between Jenkins, a Georgia resident, and FNB, a national bank located in South Dakota.[4] Loan applications were electronically

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[4] The district court correctly rejected Jenkins' assertion that First American, a Georgia entity, was the "true" lender. FNB was expressly listed as the lender in the loan documents, while First American was listed merely as the "loan marketer/servicer." FNB approved the loans, funded

transmitted to South Dakota, where FNB decided whether to approve or refuse the loans. If the loans were approved, FNB sent the borrowers preprinted Consumer Loan Agreements, each including an Arbitration Agreement. The district court explained: "First National Bank's role in analyzing loan applications, sending the approved loan applications, funding the loans, and accepting the loan proceeds constitutes sufficient interstate commerce to satisfy the definition of 'involving commerce' within the meaning of 9 U.S.C. §§ 1, 2." *Jenkins v. First Am. Cash Advance of Georgia*, 313 F. Supp. 2d 1370, 1373 (S.D. Ga. 2003) (citation omitted).

We agree with the district court. Here, the parties not only contemplated an interstate commerce connection when they entered into the lending agreements,[5] but the payday lending transactions did, in fact, turn out to involve interstate commerce. The district court did not err in applying the FAA to the loan agreements signed by Jenkins.[6]

B. Unconscionability

Under the FAA, a written arbitration provision is "valid, irrevocable, and enforceable, save upon such grounds as exist

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the loans, and set the credit scoring criteria for the loans. Also, repayment checks were made out to FNB and deposited in a bank account in FNB's name.

[5] The Arbitration Agreements expressly stipulated the lending transactions between Jenkins and Defendants involved interstate commerce and were governed by the FAA.

[6] We also reject Jenkins' argument that the FAA does not apply because the Georgia legislature recently made a general pronouncement that payday lending does not involve interstate commerce. *See* Ga. Code Ann. § 16-17-1(d) (2003 & Supp. 2004) (effective May 2004). Courts determine whether or not interstate commerce exists under the FAA on a case-by case analysis by examining whether the transaction in question turns out, in fact, to have involved interstate commerce. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277-81, 115 S. Ct. 834, 841-43 (1995).

at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (2000) (emphasis added). This language has been interpreted to mean "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 1656 (1996)). The Supreme Court has recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." *Doctors Assocs.*, 517 U.S. at 687, 116 S. Ct. at 1656. In this case, Appellant argues, and the district court found, the Arbitration Agreements signed by Jenkins are unconscionable.

In deciding claims of unconscionability, Georgia courts generally consider a variety of factors, which have been divided into procedural and substantive elements.[7] *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 771-72 (Ga. 1996). "Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves." *Id.* at 771. Factors relevant to the procedural unconscionability inquiry include the bargaining power of the parties, "the conspicuousness and comprehensibility of the contract language, the oppressiveness of

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[7] In determining whether the Arbitration Agreements were unconscionable, the district court applied Georgia unconscionability law. The choice-of-law provisions in the Arbitration Agreements stipulated that the FAA governs those Agreements, and that if a court found the FAA did not apply to a particular transaction, then South Dakota *arbitration* law would govern. Moreover, the choice-of-law provisions within the Promissory Notes provided that those Notes would be controlled by the laws of South Dakota. As South Dakota's unconscionability laws mirror Georgia's laws, the outcome of the unconscionability issue would be the same regardless of which state law applied. *See Johnson v. John Deere Co.*, 306 N.W.2d 231, 237-38 (S.D. 1981) (applying the same two-part analysis of procedural and substantive unconscionability).

the terms, and the presence or absence of a meaningful choice." *Id.* (citations omitted). As for substantive unconscionability, courts consider "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns." *Id.* at 772 (citations omitted).

On the procedural side of this analysis, the district court found that Defendants had superior bargaining power and that the Arbitration Agreements constituted adhesion contracts. On the substantive side of the analysis, the court provided two reasons for finding the terms of the Agreements to be unconscionable: (1) precluding class action relief was unfair because a class action is the most effective method for borrowers with small claims to obtain relief; and (2) the Arbitration Agreements lacked mutuality of obligation because the provision providing access to a small claims tribunal would only benefit the lender, FNB.

The district court explained that considered individually, these factors might not be enough to support a finding of unconscionability, but that considered together, they rendered the Arbitration Agreements unconscionable. We disagree.

1. *Bargaining Power/Adhesion*

The district court found the Arbitration Agreements were "procedurally oppressive" because the "type of consumer loans that Defendants offer unquestionably places the consumer at a severe bargaining disadvantage." *Jenkins*, 313 F. Supp. 2d at 1374. The court stated "[c]onsumers who are willing to borrow money at such [high] interest rates would foreseeably sign anything." *Id.* The court further explained consumers were unable to negotiate the terms of the preprinted contracts. After a customer, like Jenkins, filled out a loan application at First American's offices, the application would be electronically transmitted to FNB. FNB would then send a completed Consumer Loan Agreement, including an

Arbitration Agreement, back to First American for the borrower to sign. The court found the contracts to be adhesive because the borrower was unable to discuss or negotiate "the amount and conditions of the preprinted agreement." *Id.*

Before considering the merits of the adhesion argument, we must first decide whether this issue is one for an arbitrator or a court to resolve. The FAA "provides a remedy to a party seeking to compel compliance with an arbitration agreement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, 87 S. Ct. 1801, 1806 (1967). Such a party can move the district court for an order compelling arbitration. 9 U.S.C. § 4 (2000). Section four of the FAA instructs the federal court to grant the motion and order arbitration once it is satisfied "that the making of the agreement for arbitration . . . is not in issue." *Id.* If, however, the making of the arbitration agreement is in question, then the federal court may first adjudicate that issue. *Id.*

In interpreting this section of the FAA, the Supreme Court has distinguished between claims that challenge the contract generally and claims that challenge the arbitration provision itself. *See Prima Paint Corp.*, 388 U.S. at 403-04, 87 S. Ct. at 1806. In *Prima Paint*, the plaintiff sought to rescind a contract on the grounds that the contract was fraudulently induced. *Id.* at 398, 87 S. Ct. at 1803. The defendant, on the other hand, sought to invoke the contract's arbitration clause and moved to stay the action pending arbitration. *Id.* at 398-99, 87 S. Ct. at 1803. The Supreme Court explained:

> [I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. at 403-04, 87 S. Ct. at 1806. The Court concluded that because the fraudulent inducement claim related to the under-

lying contract generally, and not to the arbitration clause specifically, it was a matter to be resolved by the arbitrator, not the federal court. *Id.* at 406, 87 S. Ct. at 1807.

This Court has applied the *Prima Paint* rule to claims of adhesion and unconscionability. We have held that "[i]f . . . [the party's] claims of adhesion, unconscionability, . . . and lack of mutuality of obligation pertain to the contract as a whole, and not to the arbitration provision alone, then these issues should be resolved in arbitration." *Benoay v. Prudential-Bache Secs., Inc.*, 805 F.2d 1437, 1441 (11th Cir. 1986) (citations omitted).

Here, the adhesion arguments relied on by the district court pertain to the underlying Consumer Loan Agreements as a whole, and not to the Arbitration Agreements specifically. As explained above, the adhesion arguments were (1) that the consumers lacked bargaining power because these "type[s] of consumer loans . . . would only appeal to extremely desperate consumers," and (2) that the consumers were allegedly unable to negotiate the terms and conditions of the preprinted agreements. *Jenkins*, 313 F. Supp. 2d at 1374. These claims do not relate to the Arbitration Agreements themselves; rather, they allege the Consumer Loan Agreements, in general, were adhesive. Under the Supreme Court's decision in *Prima Paint* and our decision in *Benoay*, the FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive. We conclude, therefore, Jenkins' adhesion claims are for an arbitrator, not a federal court, to decide.

2. *Class Action Waiver*

The district court found the Arbitration Agreements were substantively unconscionable because they preclude "borrower[s] from either instigating or participating in a class action suit." *Jenkins*, 313 F. Supp. 2d at 1375. The court explained "[a] class action is the only way that borrowers

with claims as small as the individual loan transactions [at issue in this case] can obtain relief." *Id.* The district court considered the cost of attorney's fees to be a significant factor in determining whether the Arbitration Agreements are unconscionable. *Id.* The court speculated that a borrower who attempts to pursue her claim individually based on one loan transaction would "probably" be unable to obtain a lawyer on a contingent fee basis. *Id.* The district court found requiring arbitration and prohibiting class action "would have the practical effect of providing Defendants immunity." *Id.*

As an initial matter, we note this issue may be decided by a federal court. The class action waiver was a provision included in each of the Arbitration Agreements. Unlike the adhesion argument, which applies to the loan contracts generally, this claim alleges the Arbitration Agreements specifically are unconscionable because they preclude class action relief. Under section four of the FAA, a federal court may adjudicate this claim because it applies to the Arbitration Agreements themselves, and thus, it places the making of the Arbitration Agreements in issue. *See* 9 U.S.C. § 4 (2000).

We have held, however, that arbitration agreements precluding class action relief are valid and enforceable. *See Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 819 (11th Cir. 2001) (holding "a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA"). Other federal circuit courts have similarly enforced arbitration agreements despite the fact that classwide relief was unavailable. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting the borrower's argument "that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages"); *Johnson v. West Suburban Bank*,

225 F.3d 366, 369 (3d Cir. 2000) (holding arbitration "clauses are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable"); *cf. Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) ("The Arbitration Agreement at issue here explicitly precludes the [borrowers] from bringing class claims or pursuing 'class action arbitration,' so we are therefore 'obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.'") (citations omitted).

In addition, the district court's contention that consumers would likely be unable to obtain legal representation without the class action vehicle is unfounded. The Arbitration Agreements expressly permit Jenkins and other consumers to recover attorneys' fees and expenses "[i]f allowed by statute or applicable law." Under the Georgia RICO statute, a prevailing plaintiff may be awarded attorney's fees. Ga. Code Ann. § 16–14–6(c). Jenkins, therefore, can presumably recover attorneys' fees and costs if she prevails in arbitration on her Georgia RICO claim.[8] *See Snowden*, 290 F.3d at 638 (in rejecting an unconscionability argument, the court concluded the plaintiff could recover attorney fees in arbitration if she prevailed on her TILA and civil RICO claims).

Georgia courts have explained that by authorizing the recovery of attorneys' fees, the Georgia RICO statute provides plaintiffs "with effective access to the judicial process." *Dee v. Sweet*, 489 S.E.2d 823, 825 (Ga. 1997). Moreover, federal circuit courts have recognized that arbitration agreements prohibiting class action relief do not "necessarily choke off the supply of lawyers willing to pursue claims on behalf

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[8] Also, Jenkins' arbitration costs would not be expensive. Under the Arbitration Agreements, Defendants have offered to advance Jenkins' arbitration expenses, such as filing and administrative fees, if she submits a written request.

of debtors." *Johnson*, 225 F.3d at 374; *see also Snowden*, 290 F.3d at 638. These courts explained that when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent such debtors in arbitration. *See Snowden*, 290 F.3d at 638; *Johnson*, 225 F.3d at 374.

Thus, precluding class action relief will not have the practical effect of immunizing First American and FNB. The Arbitration Agreements permit Jenkins and other consumers to vindicate all of their substantive rights in arbitration. We conclude, therefore, the inclusion of a class action waiver in the Arbitration Agreements did not render those Agreements substantively unconscionable.

3. *Access to Small Claims Tribunals*

The district court's finding of substantive unconscionability was also based on the provision in the Arbitration Agreements permitting either party to seek adjudication in a small claims tribunal. The court found the Arbitration Agreements lacked mutuality of obligation because this provision only benefits Defendants.

On its face, this provision does not favor one party over the other; rather, it provides that "[a]ll parties . . . shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction." The district court, however, found a borrower's ability to pursue an action in a small claims tribunal to be illusory. The court speculated that it is "hard to conceive of a claim by the payday lender that cannot be sought in a small claims tribunal," but it is "easy to envision a plethora of claims a consumer might seek which are inaccessible in [such a tribunal] due to its limited jurisdiction." *Jenkins*, 313 F. Supp. 2d at 1375. Additionally, the district court explained this provision fa-

vored Defendants because the judgments of small claims tribunals were appealable to an arbitrator.[9]

Under Georgia law, if at the time the agreement is to be enforced, "the contract contains mutual obligations equally binding on both parties to the contract, then the contract is not unilateral and unenforceable." *Jones v. Quigley*, 315 S.E.2d 59, 60 (Ga. Ct. App. 1984). In this case, both Jenkins and Defendants had equal access to small claims tribunals. The only restriction, which applied equally to both parties, was that the claims sought in such a tribunal must fall within the tribunal's limited jurisdiction.

In stating it could "envision a plethora of claims" that consumers would not be able to raise in small claims courts, the district court apparently overlooked the many claims that consumers *could* bring in such tribunals. For example, if FNB charged a consumer an interest rate higher than that agreed upon in the contract, the consumer could, in most instances, pursue an action for the difference in a small claims court. Additionally, if FNB mistakenly imposed late charges on a consumer, he could presumably seek recovery in a small claims tribunal. Thus, we disagree with the district court's unsupported speculation that the consumers' ability to pursue an action in a small claims tribunal is illusory.

We note, moreover, that the provision providing access to small claims tribunals was intended to benefit, not injure, consumers. The American Arbitration Association (AAA) has developed a set of principles, known as the Consumer Due Process Protocol, to protect consumers and ensure they are treated equitably in arbitration. *See generally* American Arbitration Association, Consumer Due Process Protocol, (Apr.

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[9] We note this claim alleged the Arbitration Agreements themselves were unconscionable due to a lack of mutuality of obligation; therefore, the district court had the authority, under the FAA, to adjudicate the issue. *See* 9 U.S.C. § 4 (2000).

17, 1998), http://www.adr.org/protocols. Principle 5 of this Protocol expressly states that consumer arbitration agreements, like those at issue here, should offer all parties the option of seeking adjudication in a small claims tribunal. *Id.* The Comment to Principle 5 explains "access to small claims tribunals is an important right of Consumers" because it provides "a convenient, less formal, and relatively expeditious judicial forum for handling . . . disputes" involving small amounts of money. *Id.* By including a provision that offers access to such tribunals, the Arbitration Agreements at issue here merely complied with the AAA's Consumer Due Process Protocol. Such compliance further undermines the district court's finding that the small-claims provision in the Arbitration Agreements only benefitted the payday lender. *Cf. Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 94-95, 121 S. Ct. 513, 524 (2000) (Ginsburg, J., concurring) (explaining the drafter of the contract could have relied on the AAA's Consumer Arbitration Rules to ensure the claims are arbitrated under a "consumer-protective fee arrangement").

We further note the district court did not provide support for its assertion that the small-claims provision favors Defendants because the judgments from small claims courts are appealable to an arbitrator. This aspect of the small-claims provision is equally binding on Jenkins and Defendants, as both parties are obligated to appeal such judgments to an arbitrator. Moreover, the arbitral forum does not unfairly favor Defendants. Jenkins, who has raised claims under Georgia usury laws and the Georgia RICO statute, is capable of vindicating all of her substantive rights in arbitration. In *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), we held the terms of the arbitration agreement at issue in that case did not "grossly favor" the payday lender because, among other reasons, "nothing in the agreement prevent[ed] the arbitrator from awarding 'the full panoply of relief' available under [the applicable] law." *Id.* at 1308; *see also Green Tree Fin. Corp.*, 531 U.S. at 90, 121 S. Ct. at 521 (holding "even claims

arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions") (alteration in original) (citation and internal quotation marks omitted). The same is true in this case, as the Arbitration Agreements do not limit Jenkins' right to relief.[10]

We conclude the small-claims provision is mutual and bilateral—it applies equally to both parties. Jenkins has not demonstrated that access to small claims tribunals unfairly benefits Defendants. The Arbitration Agreements, therefore, do not lack mutuality of obligation.

In summary, we disagree with the district court's reasons for finding the Arbitration Agreements unconscionable. The district court did not have the authority to decide the adhesion claim because that issue related to the loan agreements generally and, therefore, should have been submitted to an arbitrator. Although the district court did have the authority to adjudicate the arguments relating to the class action waiver and the small-claims provision, those contractual conditions, for the reasons explained above, did not render the Arbitration Agreements unconscionable.

C. *Legality of the Underlying Transactions*

Jenkins raises an alternative argument for affirming the denial of Defendants' motion to compel arbitration. Jenkins argues Defendants' motion should not be granted because the underlying payday loan contracts are illegal and void *ab initio* under Georgia law. *See* Ga. Code Ann. § 16-17-1 (2003 & Supp. 2004) (effective May 2004). Because the loan contracts

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[10] We note the Arbitration Agreements also permit Jenkins to either (1) choose the arbitrator from a list of national arbitration organizations, or (2) come to an agreement with Defendants in selecting a local arbitrator.

are allegedly void, Jenkins contends "there is nothing to arbitrate."

We have, however, previously considered and rejected such an argument. *Bess*, 294 F.3d at 1304–06. In *Bess*, a class action lawsuit arose out of "check advances" or "deferred payment transactions" between the plaintiffs and defendants. *Id.* at 1300. A deferred payment transaction is essentially the same as a payday lending transaction. *See id.* at 1300-01. One of the named plaintiffs in Bess, Luna Clifton Colburn, signed an arbitration agreement in connection with the deferred payment transactions. The defendants sought to enforce this agreement and compel arbitration. Like Jenkins' argument in this case, Colburn argued the arbitration agreements were unenforceable because the underlying deferred payment transactions were void as illegal under Alabama law. Colburn alleged the loans charged usurious rates of interest, and the collection of the loans violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (2000).

In rejecting Colburn's argument, we applied the *Prima Paint* rule. *Bess*, 294 F.3d at 1304-05. We explained the "allegations of illegality go to the deferred payment transactions generally, and not to the arbitration agreements specifically." *Id.* at 1305. Therefore, an arbitrator, and not a federal court, should determine whether the underlying transactions are illegal and void. *Id.* at 1306.

In *Bess*, we also distinguished our holding from our earlier decision in *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992).[11] In Chastain, we considered an "unusual" set of facts, in which the plaintiff never personally signed the customer agreements at issue. *Id.* at 852-53.

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[11] Jenkins' argument relies on a Georgia case, *Stewart v. Favors*, 590 S.E.2d 186 (Ga. Ct. App. 2003), and a Florida case, *Cardegna v. Buckeye Check Cashing, Inc.*,—So. 2d—(Fla. 2005), both of which cite this Court's decision in *Chastain*.

Without such a signature, the plaintiff argued she never assented to the arbitration clauses found within the customer agreements. *Id.* at 853. We explained:

> Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration. Under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in *general.*

Id. at 854 (citations omitted). "Where the party seeking to avoid arbitration admittedly did not sign any contract requiring arbitration, however, 'there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the [FAA].'" *Bess*, 294 F.3d at 1305 (quoting *Chastain*, 957 F.2d at 854) (alteration in original).

In *Chastain*, the plaintiff alleged "that a contract *never existed at all*" because she never signed and assented to the contracts in question. 957 F.2d at 855. She challenged "the very existence of *any* agreement, *including the existence of an agreement to arbitrate*." *Id.* at 854. In that situation, we held the plaintiff placed the making of the arbitration agreement in question, thereby permitting the district court to adjudicate the issue. *Id.* at 855. We concluded that before determining whether arbitration should be compelled under the FAA, the district court can decide whether the parties assented to the contracts containing the arbitration clauses. *Id.* at 855-56; *see also Bess*, 294 F.3d at 1305.

The plaintiff in *Bess*, Colburn, attempted to compare his void *ab initio* allegation to the contentions in *Chastain* that a contract never existed. 294 F.3d at 1305. We rejected this argument, explaining Colburn's reliance on *Chastain* was

misplaced because *Chastain* focused primarily "on the question of assent." *Id.* We explained:

> Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the *content* of the contracts, not their *existence*. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts. Thus, this case falls within the "normal circumstances" described in *Chastain*, where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying transaction.

Id. at 1305–06. Because assent to the contracts was not in question, we applied *Prima Paint* and held that whether or not the deferred payment transactions were usurious and void was an issue to be decided by an arbitrator, not a federal court. *Id.* at 1306; *see also John B. Goodman Ltd. P'ship v. THF Constr.*, 321 F.3d 1094 (11th Cir. 2003) (holding whether or not the underlying construction contracts were unenforceable under Florida law was a question for the arbitrator to decide).[12]

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[12] Other federal circuit courts have similarly held that allegations claiming high interest loan agreements are void as illegal will not preclude the enforcement of arbitration provisions included in the allegedly illegal contracts. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) ("[Plaintiff's] allegations of usurious rates of interest . . . do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that [Plaintiff] failed to assent to the terms of the . . . Agreement."); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 489-91 (6th Cir. 2001) (holding plaintiffs' allegations that the

Jenkins' void *ab initio* argument is no different from the argument we dismissed in Bess. Jenkins assented to the payday loan contracts and the Arbitration Agreements associated with those contracts. It is undisputed that she signed and dated both a Promissory Note and an Arbitration Agreement each time she obtained a loan from FNB. Jenkins argues the payday loan contracts are void, not because she failed to assent to the terms of the contracts, but because those terms render the contracts usurious and void under Georgia law. Thus, Jenkins does not challenge the existence of either the payday loan contracts or the accompanying Arbitration Agreements; rather she challenges the content of the contracts—i.e., the rates of interest charged in the loan agreements. As we held in *Bess*, we conclude Jenkins and Defendants entered into "presumptively valid agreement[s] to arbitrate any disputes, including those about the validity of the underlying transaction." *Bess*, 294 F.3d at 1306; *see also John B. Goodman Ltd. P'ship*, 321 F.3d at 1096. We conclude, therefore, that Jenkins' void *ab initio* argument, which challenges the legality of the payday lending transactions, is an issue for the arbitrator, not the court, to decide.[13]

IV. CONCLUSION

For the reasons stated above, we conclude the district court erred in finding the Arbitration Agreements at issue in this case unconscionable and unenforceable. Moreover, Jenkins' alternative argument for affirming the district court—alleging the underlying payday lending transactions are void *ab initio* under Georgia law—is an issue for an arbitrator, not the

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high interest loan agreements were void as illegal was an issue to be decided by an arbitrator).

[13] We note this issue raised a question of federal law—namely, deciding whether the district court has the authority under the FAA to adjudicate Jenkins' claim that the payday lending transactions were illegal. *See Bess*, 294 F.3d at 1306 n.3. In deciding this federal question, we do not pass judgment on any issues of Georgia contract law. *See id.*

court, to decide. Accordingly, we reverse the district court's decision and remand with instructions to grant Defendants' motion to compel arbitration.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA AUGUSTA DIVISION

[Filed Nov. 25, 2003]

Civil Action No. CV 103-094

CHARLENE JENKINS, And All Other Persons
Similarly Situated,
Plaintiffs,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, LLC,
First Defendant,

FIRST NATIONAL BANK IN BROOKINGS,
Second Defendant.

ORDER

Before the Court is Defendants' motion to stay and to compel arbitration in the captioned case. Plaintiff opposes arbitration as set forth in her somewhat tardy response to the motion.[1] For the following reasons, Defendants' motion is DENIED.

I. BACKGROUND

Plaintiff represents a proposed class of individuals who entered into loan transactions with Defendants. Between June 7, 2002 and September 6, 2002, Plaintiff completed a series

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[1] Under the Local Rules of this Court, the Court may deem the motion unopposed because of Plaintiff's untimely response. *See* L.R. 7.5, S.D. Ga. I will, however, address the merits of Defendants' motion notwithstanding the untimely opposition.

of eight loan transactions, each for less than $500 with Defendants. (Doc. No. 1, Ex. A.) A loan application for each transaction was completed at the offices of First American Cash Advance of Georgia ("First American"). Under the all encompassing terms of the loan documents, Plaintiff agreed to either arbitrate, or assert in a small claims tribunal, all claims against both First National Bank in Brookings ("First National Bank") and First American. (Doc. No. 4, Ex. C.) The arbitration agreements also requires Plaintiff to waive her right to serve

> as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants, in any lawsuit filed against us and/or related third parties.

(Doc. No. 4, Ex. D.) Plaintiff filed a putative class action suit, based on state law claims, in the Superior Court of Richmond County, Georgia. Defendants successfully removed the case to this Court. Defendants now seek to stay the court proceedings and compel arbitration pursuant to the terms of the arbitration agreement contained in each of the loan documents.

II. ANALYSIS

Plaintiff signed and dated an Arbitration Agreement each time she took out a loan with Defendants. (Doc. No. 4, Ex. D.) The Federal Arbitration Act ("FAA") makes valid any written agreement to arbitrate a dispute arising out of a transaction involving interstate commerce. 9 U.S.C. § 4. Where a party to such an agreement fails or refuses to arbitrate, the other party may move for an order compelling arbitration. *Id.* Furthermore, Section 4 of the FAA requires that the district court "must grant the motion if it is satisfied that the parties actually agreed to arbitrate the dispute." *Bess v. Check Express*, 294 F.3d 1298, 1304 (11th Cir. 2002). However, if the making of the arbitration agreement is in issue, "the court

must first adjudicate whether the agreement is enforceable against the parties." *Id.* Here, Plaintiff argues that the arbitration clause and agreement are unenforceable. Plaintiff contends first that the FAA does not apply to the underlying transaction, and second that the arbitration clause and agreement are unconscionable. The Court will address both of these arguments in turn.

A. The Application of the FAA

Plaintiff contends the loan transactions do not involve interstate commerce, thus the FAA does not apply. For the FAA to apply, the transactions must fall within the definition of "involving commerce," as defined by 9 U.S.C. §§ 1 & 2. Section 1 of the FAA defines "commerce" as "commerce among the several states." 9 U.S.C. § 1. Section 2 of the FAA expounds on Section 1, providing:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Thus, the Court must determine if the transactions and loan documents satisfy 9 U.S.C. §§ 1, 2.

Plaintiff contends that she dealt exclusively with First American and that despite the loan agreement boilerplate language First National Bank was not the lender. Yet, First National Bank, a national bank located in South Dakota, is clearly listed on both the Promissory Note and the arbitration agreement as the lender (Doc. No. 4, Exs. C, D.) Furthermore, First National Bank set all the credit scoring criteria for

the loans and approved or refused all applications. (Manning Aff. ¶ 6.) If the loan application was approved, First National Bank transmitted a preprinted "Consumer Loan Agreement" (*Id.* ¶ 8), which included an arbitration agreement signed by a representative of First National Bank. (Doc. No. 4, Ex. D.) The borrowers' checks are all made out to First National Bank and are also deposited in a bank account in First National Bank's name.

Plaintiff points to First American's ability to deposit the borrowers' checks in the bank account as proof that First American is the entity really controlling the loans. However, First American's ability to deposit checks in First National Bank's account does not show that First American is the lender. First National Bank's role in analyzing loan applications, sending the approved loan applications, funding the loans, and accepting the loan proceeds constitutes sufficient interstate commerce to satisfy the definition of "involving commerce" within the meaning of 9 U.S.C. 1, 2. *See Staples v. Money Tree Inc.*, 936 F. Supp. B56, 85B (M.D. Ala. 1996).

B. Unconscionability

The FAA makes valid any "written agreement to arbitrate a dispute arising out of a transaction involving interstate commerce, save upon such grounds as exist at law or in equity for the revocation of a contract." *Bess*, 294 F.3d at 1304. However, the state law must apply to contracts generally and not arbitrations specifically. *Id.* at 1306. Here, the Plaintiff contends that the arbitration clause and agreement are unenforceable because it is unconscionable. Since, this contention places in issue the enforceability of the arbitration agreement itself, it is an issue for this Court and not an arbitrator. *Id.*

The court must determine whether the agreement is one that under the circumstances, "no sane man not acting under a delusion would make and no honest man would take advan-

tage of." *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 771 (Ga. 1996). To determine if a contract or a contract clause qualifies as unconscionable under this concept, Georgia courts generally divide the relevant factors into procedural and substantive elements. *Id.* Procedural unconscionability addresses the process of making the arbitration agreement, while substantive unconscionability looks to the arbitration terms themselves. Some factors Georgia courts have considered in determining whether a contract is procedurally unconscionable include the relative bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *Id.* at 771–72.

The type of consumer loans that Defendants offer unquestionably places the consumer at a severe bargaining disadvantage. The rates of interest the lender charged, between approximately 438.00% and 938.57% annually, would only appeal to extremely desperate consumers. (Doc. No. 1, Ex. A.) Consumers who are willing to borrow money at such interest rates would forseeably sign anything.

Furthermore, the arbitration clause in the contract and arbitration agreement are not the product of negotiation, but adhesion contracts. According to the affidavit of Robert Manning, General Counsel of First American, a customer fills out an application at the offices of First American, the application is then transmitted electronically to First National Bank, who then sends a completed consumer agreement and arbitration agreement back to First American for the consumer to sign. (Manning Aff. ¶ 7, 8.) There was no negotiation. According to Manning's affidavit, it appears the borrower was not even able to talk to the lender who determined the amount and conditions of the preprinted agreement. (*Id.* ¶ 11.) Thus, the arbitration agreement is procedurally oppressive because of the stark inequity of bargaining power.

In analyzing the substantive element of unconscionability, Georgia courts have focused on the breadth of the arbitration clause, "matters such as commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between parties, and similar public policy concerns." *NEC Technologies*, 478 S.E.2d at 772. Here, Plaintiff alleges the arbitration agreement lacks mutuality of obligation and is therefore unconscionable because "paragraph 6 of the agreement provides for a reservation to bring action in small claims tribunals for disputes within the scope of such tribunal's jurisdiction." (Pl. Brf. in Opp. to Mot. to Stay and Compel Arbitration at 1–2.) Plaintiff's contention is that the lender receives a benefit from the access to such tribunals, and that the borrower does not. (*Id.*)

It is hard to conceive of a claim by the payday lender that cannot be sought in a small claims tribunal. Yet, it is easy to envision a plethora of claims a consumer might seek which are inaccessible in a small claims tribunal due to its limited jurisdiction. Furthermore, the borrower's ability to pursue an action in a small claims court is illusionary. According to the terms of the loan documents, the judgments of the small claims court are appealable only to an arbitrator. If a consumer brought an action in a small claims tribunal, that consumer would only be delaying the inevitable arbitration. Thus, terms of the arbitration agreement greatly favor Defendants. I find the stipulation that provides access to a tribunal that will only benefit the lender extremely troublesome. While Georgia courts have decided that mere lack of mutuality of obligation alone does not render the arbitration provision unconscionable, *Saturna v. Picklev Const. Co.*, 555 S.E.2d 825, 827 (Ga. Ct. App. 2001), and *Crawford v. Results Oriented, Inc.* 548 S.E.2d 342 (Ga. 2001), in those cases the parties bargained for the contract. As shown above, in the present case the borrower had no bargaining power.

Public policy concerns also support a finding of unconscionability. In determining whether the terms of the arbitration agreement are unfair, such terms must be examined in the context of the circumstances existing at the time the agreement was made. *Gordon v. Crown Central Petroleum Corp.*, 423 F. Supp. 58, 61 (N.D. Ga. 1976). Each arbitration clause was attached to a small loan of under $500. The arbitration agreement precludes the borrower from either instigating or participating in a class action suit. A class action is the only way that borrowers with claims as small as the individual loan transactions can obtain relief. *Leonard v. Terminix Intern Co., L.P.*, 854 S0.2d 529, 535 (Ala. 2002). The ability to pursue their grievances in small claims court as provided in the arbitration agreement is illusionary, as the lender can always appeal any judgment directly to arbitration. A borrower pursuing a claim individually based on one loan transaction against Defendants would probably be unable to procure a lawyer on a contingent fee basis, and instead would either have to face the battery of experienced defense lawyers alone or pay a lawyer by the hour. *Id.* In *Leonard*, the court reached the same conclusion as I do that the cost of attorney's fees is a significant factor in determining the arbitration agreement unconscionable. Here, prohibiting class action and requiring arbitration pursuant to an adhesion clause would have the practical effect of providing Defendants immunity. *Id.* at 536.

While there are numerous cases from the United States Supreme Court announcing a favorable disposition toward enforcing arbitration agreements, the Court has also repeatedly recognized the importance of class action relief. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). If the arbitration agreement was the product of bargained-for terms, then the waiver of class action rights would be more palatable. However, the present arbitration agreement is an adhesion clause, does not possess mutuality of obligation, and is inaccessible because it precludes class action relief. When

considered individually, these factors might not be enough to support a determination of unconscionability, but all three grossly unfavorable terms combined are more than sufficient.

After considering both the procedural and substantive elements of unconscionability, I conclude that enforcing the arbitration clause contained in the contracts and the arbitration agreement against the payday consumers would lead to an unjust result. Therefore, the arbitration agreement arising out of the contract that requires the parties to arbitrate is unconscionable and stricken from the contract as invalid. Defendants' motion to stay and compel arbitration is DENIED.

III. CONCLUSION

For the forgoing reasons, Defendants' motion to stay and compel arbitration is DENIED.

ORDER ENTERED at Augusta, Georgia, this 25th day of November, 2003.

[ILLEGIBLE]
CHIEF UNITED STATES DISTRICT JUDGE

SUPREME COURT U.S.
FILED
OCT 14 2005
OFFICE OF THE CLERK

No. 05-347

IN THE

Supreme Court of the United States

CHARLENE JENKINS,
Petitioner,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, INC. and FIRST NATIONAL BANK IN BROOKINGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly applied *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), in holding, as a matter of federal law, that it was for an arbitrator, not a court, to decide whether a loan contract which contained an arbitration provision was illegal under state law and void ab initio, where the arbitration provision itself was otherwise valid and enforceable under the Federal Arbitration Act.

CORPORATE DISCLOSURE STATEMENT

Respondent First National Bank in Brookings

No publicly held corporation owns 10% or more of Respondent First National Bank in Brookings.

Fishback Financial Corporation. *Parent Company of Respondent First National Bank in Brookings. No publicly held corporation owns 10% or more of Fishback Financial Corporation.*

Respondent First American Cash Advance of Georgia, Inc.

DC Investments Trust, *Owners of First American Management, Inc.*

FA Investments, LLC, *Owner of First American Holding, LLC*

FACA of Arkansas, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

FACA of Kentucky, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

FAS Financial, LLC, *and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Alabama, LLC, *Subsidiaries of First American Holding, LLC*

First American Cash Advance of Arkansas, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Colorado, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Florida, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Georgia, LLC, *Respondent and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Kentucky, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Oklahoma, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of South Carolina, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Tennessee, LLC (f/k/a Kugler, LLC), *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Financial Services, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Franchising, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Holding, LLC, *Sole Member and Chief Manager for Respondent First American Cash Advance of Georgia, Inc.*

First American Investments of Georgia, LLC, *Subsidiaries of First American Holding, LLC*

First American Management, Inc., *Owner of First American Holding, LLC*

First American Tax Services, LLC, *and Subsidiaries of First American Holding, LLC*

Foresight Management Company, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

JP Investments Trust, *Owners of First American Management, Inc.*

National City Bank of Kentucky, *Successor Trustee and Owner of First American Management, Inc.*

P.A.J. Irrevocable Trust, *Owner of First American Management, Inc.*

SH Investments Trust, *Owner of First American Management, Inc.*

United Services, Inc., *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

Union Management Company, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

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IN THE

Supreme Court of the United States

No. 05-347

CHARLENE JENKINS,

Petitioner,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, INC. and FIRST NATIONAL BANK IN BROOKINGS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner argues that certiorari should be granted given the pendency of *Buckeye Check Cashing, Inc. v. Cardegna*, 894 So. 2d 860 (Fla. 2005), *cert. granted*, 125 S. Ct. 2937 (2005). (*See* Pet. at 3, 6). In *Cardegna*, the Florida Supreme Court held that "where a party sufficiently alleges that a contract is void for violation of Florida's usury laws, the Florida courts, and not an arbitrator, must first determine the contract's legality before a party may be required to submit to arbitration under a provision of the contract." *Id.* at 865.

In the present case, Petitioner alleges that her loan contracts were void ab initio because they violated Georgia's usury laws. Nevertheless, the United States Court of Appeals for the Eleventh Circuit, applying federal law as articulated

by this Court in *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), enforced the arbitration provisions in her loan contracts and held that an arbitrator, not a court, should determine whether the loan contracts were illegal. (Pet. at 12, 15-16). Petitioner asserts that the Court of Appeals' decision "conflicts" with *Cardegna* and asks this Court to "hold the case until the propriety of *Cardegna* is determined." (Pet. at 3).

The Petition should be denied, as *Cardegna* is a materially different case. First, the only defendant in *Cardegna* was the local lender in Florida, Buckeye Check Cashing, Inc., and the loans were not made by a national bank (or any bank constituted under federal authority). By contrast, in the present case, Petitioner obtained loans from a national bank and sued not only the local servicer of her loans, Respondent First American Cash Advance of Georgia ("First American"), but also the **national bank**—Respondent First National Bank in Brookings (the "Bank"), which was the lender. Thus, the merits of Petitioner's usury claims will be decided under the National Bank Act, 12 U.S.C. §§85-86, which completely preempts state usury law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003). There is **no voiding** of the loan under the National Bank Act, even if usury is proven. *Oates v. First Nat'l Bank of Montgomery*, 100 U.S. 239, 250 (1879). Therefore, it is impossible for Petitioner to "sufficiently allege," as in *Cardegna*, "that a contract is void for violation of [state] usury laws." 894 So. 2d at 865. Petitioner's "void ab initio" allegation in this case is purely illusory.[1]

Second, *Cardegna* was wrongly decided because the Florida Supreme Court misapplied *Prima Paint, supra*. In *Prima Paint*, this Court held that under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, challenges to the validity of a contract containing an arbitration provision must be decided

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[1] As discussed in note 9 *infra*, the fact that Respondent First American is not a national bank does not alter this conclusion.

by an arbitrator, not a court, if the arbitration provision is otherwise enforceable. The arbitration agreement is separable from the overall contract as a matter of *federal* substantive arbitration law, even if separability would not be permitted by state law. 388 U.S. at 402-04. The *Cardegna* court flouted the FAA and *Prima Paint* in holding that separability is determined by state law principles and that courts, not arbitrators, should determine the validity of the contract containing the arbitration clause.[2] This Court granted certiorari to review the *Cardegna* court's aberrational ruling. There is nothing to correct in this case since the Court of Appeals properly applied *Prima Paint*.[3]

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[2] *Prima Paint* was binding on the Florida Supreme Court because the FAA creates a body of federal substantive law of arbitrability that applies in both federal and state courts. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[3] Tacitly conceding that the law is not on her side, Petitioner digresses into a misplaced, and egregiously erroneous, *ad hominem* attack on the payday loan industry. (*E.g.*, Pet. at 1-2, 7-10). Respondents vigorously dispute Petitioner's assertions but do not engage in a detailed rebuttal here because those assertions are legally irrelevant to the federal arbitration question at hand. There is no exception in the FAA for payday lending disputes, and every Federal Circuit Court that has addressed the issue has held that under *Prima Paint*, an otherwise valid arbitration agreement contained in a payday loan contract is valid and enforceable. *See Jenkins v. First American Cash Advance of Ga., Inc.*, 400 F.3d 868, 882 (11th Cir. 2005) ("allegations claiming [that] high interest loan agreements are void as illegal will not preclude the enforcement of arbitration provisions included in the allegedly illegal contracts"); *Bess v. Check Express*, 294 F.3d 1298, 1305 (11th Cir. 2002) ("the issue raised by [plaintiff]—whether the deferred payment transactions are void as illegal—is one for the arbitrator, not the court . . . ."); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) ("[Plaintiff's] allegations of usurious rates of interest ... do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that [Plaintiff] failed to assent to the terms of the . . . Agreement"); *Burden v. Check into Cash of Ky., LLC*, 267 F.3d 483, 490 (6th Cir. 2001) (plaintiffs' allegations that

COUNTERSTATEMENT OF THE CASE

Petitioner-plaintiff Charlene Jenkins brought a putative class action lawsuit against Respondents-defendants the Bank and First American in the Superior Court of Richmond County, Georgia in May 2003. The Bank is a national bank, chartered under the National Bank Act, with its principal offices in South Dakota. (App. 2a-3a, 6a-7a, 27a-28a). First American managed and serviced the loans made by the Bank to Petitioner.[4] (*Id.*).

Petitioner's complaint alleged state law usury claims under the Georgia Industrial Loan Act, the Georgia criminal usury statute and the Georgia RICO statute. (App. 5a). All of Petitioner's claims arose out of eight loans she obtained from the Bank between June 7, 2002 and September 6, 2002. (App. 3a). Each loan was evidenced by a Promissory Note which included an Arbitration Agreement. Petitioner signed each Promissory Note and each Arbitration Agreement. (App. 3a, 26a).

The Arbitration Agreement broadly applied to the borrower, the Bank and First American and stated that any party to a "dispute" may demand arbitration. (Ct. App. Doc. 22—Pg 3; Ct. App. Doc. 4—Ex D). The Arbitration Agreement stated that the term "dispute" is to be "given the broadest possible meaning."—"Dispute" is defined as including without limitation "all federal or state law claims, disputes or controversies arising from or relating directly or indirectly to this Loan Agreement" and "all claims based upon a violation

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deferred payment contracts were void as illegal constituted a challenge to the substance of the loan agreements and thus were for arbitrator, not court, to decide), *cert. denied*, 535 U.S. 970 (2002).

[4] Both the Court of Appeals and the District Court held that the Bank was the true lender and rejected Petitioner's contention that First American was the real lender (App. 7a, 27a-28a). Petitioner does not seek certiorari with respect to that conclusion.

of any state or federal . . . statute . . . ." Therefore, the Arbitration Agreement indisputably covered Petitioner's claims that her payday loan contracts violated state usury statutes.

Respondents removed the lawsuit to the United States District Court for the Southern District of Georgia on June 25, 2003. (App. 6a). The basis for removal was the National Bank Act, 12 U.S.C. §§ 85 and 86, which completely preempts state usury laws with regard to credit extended by a national bank and provides the exclusive remedy for usury claims against a national bank. *See Beneficial Nat'l Bank v. Anderson*, *supra*.

Petitioner filed a motion to remand the case to state court. The District Court denied the motion and held that a federal question existed because Sections 85 and 86 of the National Bank Act completely preempt all of Petitioner's state law usury claims. (Ct. App. Doc. 9—p. 5, *citing Anderson*, *supra*).

Respondents then moved under Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3-4, to stay the litigation and compel arbitration pursuant to the Arbitration Agreements contained in Petitioner's loan contracts. On November 25, 2003, the District Court denied Respondents' motion and refused to stay the litigation or compel arbitration. (App. 25a). In its Order, the District Court properly found, *inter alia*, that "[Petitioner] signed and dated an Arbitration Agreement each time she took out a loan with [Respondents]" (App. 26a) and that the transactions in question involved "sufficient interstate commerce" for the FAA to apply (App. 27a-28a). It was also undisputed that the Arbitration Agreements covered Petitioner's claims.

Nevertheless, the District Court found the Arbitration Agreement to be unconscionable under Georgia law because it was allegedly adhesive in nature, supposedly lacked mutuality and contained a class action waiver. (App. 28a-32a). The District Court did not address Petitioner's assertion

that the Promissory Note violated Georgia law and was void ab initio.

On appeal, a unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed the existence of federal jurisdiction. The Court of Appeals emphasized that:

> "'In actions against national banks for usury, [§§ 85 and 86] supercede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.'" (App. 6a) (quoting *Beneficial Nat'l Bank v. Anderson*, *supra*, 123 S. Ct. at 1264) (emphasis added).[5]

On the merits of the appeal, the Court of Appeals reversed, holding that the District Court erred in finding the Arbitration Agreement to be unconscionable and refusing to compel arbitration. (App. 1a). With respect to the issue raised in the instant Petition,[6] the Court of Appeals rejected Petitioner's argument that her claims should not be arbitrated because the arbitration provision was contained in a usurious loan agreement which was illegal and void ab initio under Georgia law. (App. 19a-23a). The Court of Appeals reasoned that under the FAA and *Prima Paint*, such broad-based challenges to the entire agreement (rather than the arbitration provision itself) are for the arbitrator, not a court, to decide. (*Id.*).[7] The

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[5] Petitioner has not sought certiorari with respect to this conclusion.

[6] Petitioner does not challenge any of the other conclusions or findings of the Court of Appeals.

[7] Petitioner erroneously asserts that the Court of Appeals held that the "trial court had no right to determine the validity of the agreement to arbitrate . . . ." (Pet. at 5). On the contrary, the Court properly held that under the FAA and *Prima Paint*, the validity of the arbitration agreement

Court of Appeals declined petitioner's invitation to follow *Cardegna* (App. 20a) and remanded to the District Court with instructions "to grant [Respondents'] motion to compel arbitration." (App. 24a).

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the United States Supreme Court provides in pertinent part as follows:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [or] has decided an important federal question in a way that conflicts with a decision by a state court of last resort;
>
> * * *
>
> (c) a . . . United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

None of the reasons specified in Rule 10 for granting a writ of certiorari exists in the present case. Petitioner's heavy reliance upon *Cardegna* is misplaced because the National Bank Act completely preempts state usury law in this case and, in any event, *Cardegna* was wrongly decided. Nor is

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itself (but not the validity of the underlying contract) is for the court to determine. (App. 23a).

Petitioner's argument that the Court of Appeals "misapplied *Prima Paint*" and its own prior decisions (Pet. at 11, 14-15) the least bit persuasive. Even if that were the case—and it is not—it would not merit review by this Court.

I. UNLIKE THE PRESENT CASE, *CARDEGNA* DID NOT INVOLVE A NATIONAL BANK AND WAS WRONGLY DECIDED

A. *Cardegna* Did Not Involve the National Bank Act

Ultimately, the remedy in this case—if any[8]—will *not* derive from Georgia law or any other state law. The remedy will be dictated by the National Bank Act, 12 U.S.C. §§ 85-86, because the Bank, which made the loans in question, is a national bank. These federal statutes permit a borrower from a national bank to bring an "action in the nature of an action of debt" (12 U.S.C. § 86) and, if successful, to obtain a double-interest penalty and a forfeiture of unpaid interest. **They do not render the loans void**, in contrast to alleged Georgia law. As this Court held in *Oates v. First Nat'l Bank of Montgomery*, *supra*, 100 U.S. at 249-50:

> "The statute under which the bank was organized, known as the National Banking Act, does not declare the contract, under which the usurious interest is paid, to be *void*. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the

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[8] National banks are permitted under 12 U.S.C. § 85 to charge interest at the rates allowed by the laws of the states where they are located, notwithstanding more restrictive usury laws that otherwise apply in the borrowers' state. *Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). In South Dakota, where Respondent Bank is located, "regulated lenders" (which includes national banks) "are exempt from all limitations on the rate of interest which they may charge and are further exempt from the operation and effect of all usury statutes," with certain exceptions not applicable here. S.D. Cod. Laws § 54-3-13 (2005).

> debtor the right to sue for and recover twice the amount of interest so paid." (Emphasis in original).

Unlike *Cardegna*, where the loan was not made by a national bank and no national bank was named as a defendant, the Bank made the loan and is a named defendant in this case. Indeed, this action was removed to federal court based upon the complete preemption principles most recently addressed in *Beneficial Nat'l Bank v. Anderson*, *supra*. In *Anderson*, this Court held that Sections 85 and 86 of the National Bank Act completely preempt state usury laws with regard to credit extended by a national bank and provide the exclusive remedy for usury claims against a national bank. This Court instructed:

> "In actions against national banks for usury, these provisions [§§ 85 and 86 of the National Bank Act] supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441." 539 U.S. at 10.

Therefore, Petitioner's overarching contention—that the loan agreements in this case are illegal under Georgia's usury laws and void ab initio (Pet. at 8-10, 15-16)—is a chimera. The merits of Petitioner's overcharge claims will be decided under federal, not state, law and the loans will never be voided.[9] Because that will be the case no matter how this

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[9] Respondent First American is not a national bank. However, that does not alter this analysis. All of Petitioner's claims are based upon the

Court rules in *Cardegna*, this Court should permit the arbitration ordered by the Court of Appeals to go forward now.

B. *Cardegna* Is an Anomaly Which Should Be Corrected Without Delaying the Arbitration in This Case

Respondents filed their motion to compel arbitration on June 25, 2003. The District Court issued its decision denying arbitration on November 25, 2003. The Court of Appeals issued its ruling reversing the District Court and compelling arbitration on February 18, 2005. After unsuccessfully moving for reconsideration in the Court of Appeals and obtaining an extension from this Court, Petitioner filed her Petition for Certiorari on September 12, 2005. Therefore, after more than two years, this matter is finally on the verge of arbitration, awaiting only this Court's denial of certiorari.

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allegation that her loans were usurious under Georgia law. (Complaint, Ct. App. Doc. 1, ¶¶ 12, 16, 18). As discussed heretofore: (a) both the District Court and the Eleventh Circuit found that the Bank was the true lender on Petitioner's loans and First American was the servicer (those conclusions are not challenged by Petitioner); (b) the legality of the loans made by the Bank to Petitioner must be evaluated under the National Bank Act, which completely preempts state usury laws; (c) national banks are permitted to charge interest at the rates allowed by the laws of the states where they are located, notwithstanding more restrictive usury laws that otherwise apply in the borrowers' states; (d) South Dakota, where the Bank is located, does not impose a cap on the interest rate a national bank may charge and exempts national banks from all usury laws; and (e) even if there were a question in this case of overcharging interest, the penalty applicable to a national bank that charges usurious interest is forfeiture of unpaid interest and payment of twice the amount of interest paid; there is no voiding of the loan. Since the Bank's loans are clearly lawful under applicable federal law, it follows that the servicer also cannot be liable. In any event, any remedy would be dictated by federal, not state, law. This contrasts with *Cardegna*, where the lender was a Florida company which was not a national bank.

There is no reason to delay arbitration any longer by holding this case for review pending this Court's decision in *Cardegna*. In *Cardegna*, the Florida Supreme Court acted in derogation of the FAA and *Prima Paint* by holding that state law, rather than federal law, should be used to determine the question of who—an arbitrator or a court—has the authority to determine a claim that the contract containing the arbitration provision is illegal under state law. As the dissent in *Cardegna* emphasized:

> "The issue in this case is not whether a check-cashing contract is void as usurious. That issue will be determined under Florida law. The issue here is *who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court. That issue must be decided under federal law, specifically the Federal Arbitration Act. The majority confuses these issues. The majority also disregards the plain language of the Federal Arbitration Act, fails correctly to apply the United States Supreme Court's decision in *Prima Paint* . . . and either ignores or fails to distinguish the federal cases compelling arbitration in identical circumstances." 894 So. 2d at 867-68 (Cantero, J., dissenting) (emphasis in original).

By contrast, in the present case, the Court of Appeals followed *Prima Paint* and properly applied federal law, not state law, in determining the issue of separability. *See Jenkins*, 400 F.3d at 882 n. 13 ("We note this [void ab initio] issue raised a question of federal law—namely, deciding whether the district court has the authority under the FAA to adjudicate Jenkins' claim that the payday lending transactions were illegal . . . . In deciding this federal question, we do not pass judgment on any issue of Georgia contract law.").

Cardegna is the latest in a line of cases in which this Court has undertaken review of state supreme court decisions misapplying the FAA. *See, e.g., The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (this Court rejected the "sub-

stantial effect" test applied by the Alabama Supreme Court and held that the FAA's commerce requirement embodies "the broadest permissible exercise of Congress' Commerce Clause power"); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (this Court held that the FAA preempted a Montana statute that required the first page of a contract to contain a notice in underlined capital letters that the contract was subject to arbitration); *Allied-Bruce Terminix Cos. v. Dobson*, *supra* (this Court held that an arbitration agreement governed by the FAA is not invalidated by Alabama's anti-arbitration statute); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (this Court invalidated California statute that required judicial consideration of claims). *Cardegna* does not reflect any "emerging conflict" between state and federal courts on the application of *Prima Paint* in payday loan cases, as hypothesized by Petitioner. (Pet. at 2). It is simply an erroneous decision by one court which was bound by, but which refused to follow, the FAA and *Prima Paint*, *supra*.

Delaying arbitration in the present case, which was correctly decided, until *Cardegna* is adjudicated will only serve to defeat the FAA's command for prompt resolution of arbitrable matters. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra*, 460 U.S. at 22 (Sections 3 and 4 of FAA "call for an expeditious and summary hearing" on motion to compel arbitration as it was "Congress' clear intent . . . to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). *Prima Paint*'s conclusion that federal courts can consider only issues relating to the making and performance of the agreement to arbitrate "not only honor[s] the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH OR MISAPPLY CONTROLLING PRECEDENT

A. The Court of Appeals Properly Applied *Prima Paint*

Petitioner errs in asserting that the Court of Appeals misapplied *Prima Paint*. (Pet. at 11-12). On the contrary, the Court correctly applied *Prima Paint* in holding that an arbitrator, not a court, should determine Petitioner's allegation that the loan contract as a whole (not just the arbitration provision that was part of that contract) violated state law and was void ab initio.

In *Prima Paint*, a party to a consulting contract which contained an arbitration clause sought to rescind the contract on the ground that it had been fraudulently induced. The seller sought to enforce the arbitration clause. This Court held that because plaintiff claimed that the contract as a whole was fraudulently induced, it was for the arbitrator, not a court, to adjudicate plaintiff's fraudulent inducement defense.

In reaching this conclusion, the *Prima Paint* Court endorsed the doctrine of "separability" under which arbitration clauses are analyzed separately from the contracts which contain them. The Court held that separability was a question of *federal* law under the FAA, not state law. It had granted certiorari in *Prima Paint* to resolve a dispute between the Second Circuit and the First Circuit on that very issue:

> "The view of the Court of Appeals for the Second Circuit, as expressed in this case and in others, is that . . . arbitration clauses, as a matter of federal law, are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud. The Court of Appeals for the First Circuit, on the other hand, has taken the view that the

> question of 'severability' is one of state law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court." 388 U.S. at 402-03.

Construing the language of the FAA, this Court endorsed the position of the Second Circuit that separability is a question of *federal* law, holding that:

> "[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 403-04.

See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., *supra*, 460 U.S. at 24 (*Prima Paint*'s separability rule is "federal substantive law of arbitrability").

In the 40 years since *Prima Paint* was decided, courts have applied its separability rule in a wide variety of factual contexts, not just in "fraud in the inducement" cases.[10] In particular, numerous courts, including the Court of Appeals herein, have held that *Prima Paint* applies to claims that the contract containing the arbitration clause is void and unenforceable under state law. *See, e.g., John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1095-97 (11th

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[10] *See, e.g., Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 529 (1st Cir. 1985) ("[t]he basis of the underlying challenge to the contract does not alter the severability principle"); *Northwestern Nat'l Life Ins. Co. v. U.S. Healthcare, Inc.*, No. 96-4659, 1998 WL 252353, at *7 (E.D. Pa. May 11, 1998) ("'The teaching of *Prima Paint* is that a . . . court must not remove from the arbitrator's consideration a substantive challenge to a contract unless there has been an independent challenge to the making of the arbitration clause itself. The basis of the underlying challenge to the contract does not alter the . . . principle.'") (citation omitted).

Cir. 2003) (court enforced arbitration clause in construction contract despite plaintiff's contention that contract was unenforceable under Florida law because it was performed by unlicensed contractor); *Snowden v. Checkpoint Check Cashing*, *supra*; *Burden v. Check into Cash of Ky., LLC*, *supra*; *Harter v. Iowa Grain Co., Inc.*, 220 F.3d 544, 550 (7th Cir. 1996) (arbitration compelled even though plaintiff contended that underlying contracts violated Commodity Exchange Act); *Mesa Operating Ltd. P'ship v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 244 (5th Cir. 1986) (claim that contract was void under state statute was issue for arbitrator, not court, to decide); *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1072 (D.C. Cir. 1990) (whether contract calls for commission of illegal act or violates public policy is for arbitrator); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) ("[a]lthough the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause").[11]

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[11] *See also Belship Navigation, Inc. v. Sealift, Inc.*, No. 95-2748, 1995 WL 447656, at *5 (S.D.N.Y. July 28, 1995) ("even if a contract is void ab initio, if the making of the arbitration agreement is not called into question, then the arbitration agreement contained within the void contract remains separate and enforceable"); *Advanced Tech. Assocs., Inc. v. Seligman*, No. 97-2374-GTV, 1997 WL 756604, at *3 (D. Kan. Nov. 18, 1997) ("Plaintiff argues that, because the Software License Agreement is void, the arbitration clause found therein must be unenforceable. The court disagrees."); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1050 (D. Col. 1991) (contention that entire contract was void must be decided by arbitrator); *Timberton Golf, L.P. v. McCumber Constr., Inc.*, 788 F. Supp. 919 (S.D. Miss. 1992) (it was for arbitrator to decide whether contract was void under state law because defendant had failed to obtain a certificate of responsibility); *Herwig v. Hahnaman-Albrecht, Inc.*, No. 96-C-6107, 1997 WL 72079, at *3 (N.D. Ill. Feb. 13, 1997) ("[b]ecause we find the arbitration clause to be enforceable, arguments about the legality of the underlying contracts are for the arbitrators, not

As stated in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, *supra*, 460 U.S. at 24: "Although our holding in *Prima Paint* extended only to the specific issue presented, the courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree."

In this case, Petitioner asserted that the Arbitration Agreements should not be enforced because the payday loan contracts in which they were contained were illegal under Georgia law and void ab initio. It was undisputed that Petitioner assented to the loan contracts and the Arbitration Agreements[12] and that the Arbitration Agreements broadly encompassed Petitioner's allegations of illegality. The Court of Appeals, applying *Prima Paint*, properly held that Petitioner's contention that the underlying loan contracts violated state law did *not* preclude enforcement of the separable and otherwise valid Arbitration Agreements. Quoting from its prior decision in *Bess v. Check Express*, *supra*,[13] the Eleventh Circuit explained:

> "'[Plaintiff] urges that the transactions in this case are void, not because he failed to assent to the essential

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this court, under the Supreme Court's holding in *Prima Paint* . . ."); Ian R. MacNeil, 2 *Federal Arbitration Law*, § 15.3.2 (1994) (*Prima Paint* applies to claims of "illegality").

[12] Neither in the District Court nor in the Court of Appeals was any issue raised concerning Petitioner's "acumen" or "intelligence." (*See* Pet. at 6). Petitioner has waived the issue. *See Lomarest v. Manspeaker*, 498 U.S. 184, 189 (1991) ("Respondents did not raise this question in the courts below, and we decline to consider it here for the first time").

[13] In *Bess*, plaintiff argued that the arbitration clause should not be enforced because the loan contract in which it was contained violated Alabama usury law and was void ab initio. The Court of Appeals held that under *Prima Paint*, because the allegations of illegality went to the loan contract as a whole, not to the arbitration clause specifically, and challenged the "content" of the contract rather than its "existence," the arbitration clause was enforceable and it was for the arbitrator, not a court, to decide plaintiff's illegality defense. 294 F.3d at 1305-06.

> terms of the contracts, but because those terms allegedly render the contracts illegal under [state] law. At bottom, [plaintiff] challenges the content of the contracts, not their existence. Indeed . . . , both the arbitration agreement and the deferred payment contracts were signed by [plaintiff], and there is no question about [plaintiff's] assent to those contracts . . . . Therefore, the issue raised by [plaintiff]—whether the deferred payment transactions are void as illegal—is one for the arbitrator, not the court . . . .'" (App. 22a).

Nothing in *Prima Paint* suggests that this Court was limiting the application of that case only to contracts that were "voidable" rather than "void." (*See* Pet. at 11). The "void versus voidable" distinction is purely a creature of state law, whereas the *Prima Paint* separability rule is substantive federal arbitration law. Significantly, although Petitioner asserts that *Prima Paint* does not apply where the underlying contract is void rather than voidable (Pet. at 11-12), the dissent in *Prima Paint* assumed that the company's fraudulent inducement defense rendered the underlying contract "void":

> "The Court here holds that the United States Arbitration Act, 9 U.S.C. §§1-14, as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—*void* because of fraud in the inducement. The Court holds, what is to me fantastic, that the legal issue of a contract's *voidness* because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties." 388 U.S. at 407 (Black, J., dissenting) (emphasis added).

Petitioner herein is essentially making the same argument that the dissent made in *Prima Paint*—an argument that was *rejected* by the *Prima Paint* majority almost 40 years ago.

B. The Court of Appeals Correctly Applied the FAA

Contrary to Petitioner's assertion (Pet. at 13), the Court of Appeals' decision was not in any way inconsistent with the FAA. The federal statute directs courts to compel arbitration where "the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. Here, it is undisputed that Petitioner assented to the Arbitration Agreements and that the broad Arbitration Agreements covered her claim that the underlying loan contracts violated state statutes.[14] Arbitration was properly compelled by the Court of Appeals.

Although Section 2 of the FAA, 9 U.S.C. § 2, permits a party opposing arbitration to assert defenses to the arbitration provision based upon generally applicable state law principles (Pet. at 13), the law that Petitioner relies upon is *not* generally applicable state contract law. Rather, Petitioner relies upon "Georgia's strong public policy against payday lending activities" as reflected in "judicial and legislative pronouncements against payday lending practices" and the state legislature's "efforts to criminalize, cease and prosecute payday lenders . . . ." (Pet. 8-10). As numerous Federal Circuit Courts, applying *Doctor's Associates, Inc. v. Casarotto, supra*, have held in analogous contexts, the FAA preempts

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[14] Petitioner errs in asserting that the arbitration provision was put "in issue" by her challenge to the validity of the underlying loan agreements. (Pet. at 14-15). Petitioner simply ignores *Prima Paint*'s holding that the arbitration provision is separable from the main contract. Neither *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992), nor *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986) (Pet. at 12, 14-15), helps Petitioner. Those cases involved the different issue of whether the plaintiff had validly "assented" to the contract in which the arbitration clause was included. (*See* App. at 20a-21a). In this case, Petitioner indisputably assented to the loan agreements and the Arbitration Agreements. In any event, it is not the role of this Court on certiorari to review whether a circuit court ruling is consistent with earlier decisions by that circuit.

state law that does not apply to all types of contracts in a state. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001) (FAA preempted Cal. Bus. & Prof. Code §20040.5 because it was "not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements").[15] *See also Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (because the California Consumer Legal Remedies Act is not a law of general applicability, it is preempted by the FAA and does not render a class action waiver in an arbitration agreement void); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, *supra*, 460 U.S. at 24 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

Ironically, Petitioner argues that the Court of Appeals' decision contravenes *Casarotto*, *supra*, by creating "'a class of super [arbitration] clauses" which are "elevated" above the contracts in which they are contained. (Pet. at 3, 6). That argument is without merit. Under *Prima Paint* and the Court of Appeals' decision herein, the arbitration provision is merely considered separately from the remainder of the contract, consistent with the limited role of the court under the FAA in enforcing agreements to arbitrate. *See Prima Paint*, 388 U.S. at 395 (under Sections 3 and 4 of the FAA, "a federal court may consider only issues relating to the making

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[15] *Accord, KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443 (5th Cir. 2001); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998); *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997); *Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc.*, 840 F. Supp. 708 (D. Ariz. 1993); *Michael v. NAP Consumer Elecs. Corp.*, 574 F. Supp. 68 (D. P.R. 1983).

and performance of the agreement to arbitrate").[16] Otherwise, as implicitly recognized in *Prima Paint*, few if any disputes would ever be arbitrated, since a party could defeat arbitration simply by alleging—as Petitioner does herein—that the underlying contract is invalid. The FAA was enacted "to overcome courts' refusals to enforce agreements to arbitrate" and to place such agreements upon the "same footing" as other contracts." *Allied-Bruce Terminix Cos. v. Dobson*, *supra*, 513 U.S. at 270-71 (citations omitted).

Petitioner errs in asserting that the Court of Appeals' decision will preclude enforcement of state usury laws. (Pet. at 13). As this Court has often recognized, arbitration does not deprive the parties of any substantive claims; it merely determines the forum for adjudicating those claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (by agreeing to arbitrate, "a party does not forgo . . . substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum"); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions"). In this case, if state usury laws are not enforced, it will be because Petitioner obtained her loans from, and sued, a national bank, which is not bound by such laws, not because she has been required to resolve her disputes in arbitration.

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[16] This Court in *Prima Paint* explained that the limited role of the court in enforcing arbitration agreements "not only honor[s] the plain meaning of the statute [the FAA] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404. Petitioner's argument that the FAA requires the judiciary to determine the validity of the contract in which the arbitration clause is contained (Pet. at 16-17) simply disregards both the FAA and *Prima Paint*.

Finally, Petitioner's reliance upon *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (Pet. 10-11), is misplaced. *Howsam* involved a completely different issue—namely, whether a court or an arbitrator should resolve a time-limit dispute—and did not even mention *Prima Paint*, much less purport to alter *Prima Paint*'s separability rule. The "gateway issue" properly addressed by the Court of Appeals in the instant case was whether a court or an arbitrator should determine Petitioner's contention that "the loan contracts are void, not because she failed to assent to them, but because those terms render the contracts usurious and void under Georgia law." (App. 23a). The Court of Appeals correctly answered that gateway question by applying federal arbitration law as mandated by *Prima Paint*.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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